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# HUMAN RIGHTS OF INDIGENOUS PEOPLES

## Report of the Technical Meeting on the Protection of the Heritage of Indigenous People (Geneva, 6-7 March 1997)

Chairperson-Rapporteur: Mrs. Erica-Irene A. Daes

1. In its resolution 1996/37 of 29 August 1996, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the Secretary-General to convene a technical meeting of representatives of the World Intellectual Property Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Environment Programme, the United Nations Development Programme, the Food and Agriculture Organization of the United Nations and the World Trade Organization with the Special Rapporteur on the study on the protection of the heritage of indigenous people, Mrs. Erica-Irene Daes. The High Commissioner/Centre for Human Rights invited the above-mentioned organizations as well as the World Bank, the International Labour Organization and the Secretariat of the Convention on Biological Diversity to send representatives.

2. The Technical Meeting on the Protection of the Heritage of Indigenous People was held at the United Nations Office at Geneva on 6 and 7 March 1997. The Special Rapporteur, and representatives from FAO, ILO, UNDP, UNEP, WIPO and WTO participated. The list of participants is contained in annex I to the present report.

3. The Technical Meeting was opened by a representative of the High Commissioner for Human Rights, who welcomed the participants and provided a brief background to the involvement of the Centre for Human Rights in indigenous issues. Indigenous organizations had in recent years requested the international community to provide effective protection of indigenous intellectual and cultural property. The study and the draft principles and guidelines for the protection of the heritage of indigenous people elaborated by the Special Rapporteur (E/CN.4/Sub.2/1995/26, annex) were an important contribution to this protection. The Meeting had been convened to allow technical experts the opportunity to exchange views about how best to address the issue.

4. By common consent, Mrs. Daes was invited to act as Chairperson-Rapporteur of the meeting. In her opening remarks, she explained the background to her study and the draft principles and guidelines and described what she considered to be the purpose of the Meeting. It was important that the relevant United Nations agencies make an effort to harmonize their activities in relation to the protection of the heritage of indigenous people. The protection of indigenous peoples' control over their knowledge was essential for their survival as well as that of humankind as a whole. The draft principles and guidelines were therefore referred to indigenous peoples and addressed not simply to Governments, intergovernmental organizations and non-governmental organizations but also to business, the media, academics and others.

5. Mrs. Daes drew attention to relevant existing international instruments, such as the International Bill of Human Rights, ILO Convention No. 169 of 1989, the Convention on Biological Diversity, and the Draft United Nations declaration on the rights of indigenous peoples. There appeared to be broad agreement that the existing legal frameworks for the protection of the intellectual property of indigenous people were inadequate and that some form of sui generis special protection was necessary to encourage indigenous people to share their knowledge and expertise with the international community. There were some divergences of approach regarding the issue of benefit-sharing, particularly between Governments and indigenous people, and disagreements about the extent to which indigenous communities were entitled to apply their own customary laws to disputes over the disposition of their heritage and knowledge.

6. At the conclusion of Mrs. Daes's introductory remarks, the agenda as drafted was accepted as a basis for the discussions. The agenda is contained in annex II.

General discussion

7. The participants expressed their appreciation of the work accomplished so far by the Special Rapporteur and provided some general information about their own activities as they related to the protection of the heritage of indigenous people. The ILO representative underlined two aspects of the draft principles prepared by the Special Rapporteur: consultation and participation. ILO Convention No. 169 also considered these two principles to be fundamental.

8. Reference was made to the WTO Committee on Trade and Environment and in particular to working paper W/8 (WT/CTE/W/8 of 8 June 1995) which reviewed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its relation to the environment. Paragraphs 77 and 78 of the working paper, which include references to indigenous peoples and local communities, stated that the TRIPS Agreement was not an obstacle to enhancing the protection of indigenous intellectual property rights. It was also pointed out that subparagraph 3 (b) of article 27 of the TRIPS Agreement relating to the protection of plant and animal inventions was due to be reviewed four years after the date of entry into force of the WTO Agreement. No concrete proposals had yet been presented. Other relevant aspects of the TRIPS Agreement were also mentioned. Since the thrust of the Agreement was to protect intellectual creations in order to contribute to promoting technological innovation and technology transfer and dissemination, WTO member States could resort to existing mechanisms of intellectual property protection in order to cover indigenous knowledge, provided that the provisions of the TRIPS Agreement were not contravened. For example, traditional requirements of novelty, inventiveness and capability of industrial application did not necessarily exclude the patentability of all indigenous knowledge on the practical use of genetic resources for pharmaceutical purposes.

9. The UNEP representative underlined the importance of the Convention on Biological Diversity. The Montreal-based Secretariat of the Convention was undertaking relevant work in the field of indigenous heritage. Complementary activities also fell within UNEP's mandate and implementation of the Convention at the national level, as called for in article 6 of the Convention, is facilitated by UNEP.

10. The WIPO representative said that intellectual property was an area in which WIPO had a strong interest in maintaining its jurisdiction and that many activities were currently being undertaken which were related to the situation of indigenous people, for example in the areas of copyright law and related areas and in various fields of industrial property. The role of the secretariat of the International Union for the Protection of New Varieties of Plants (UPOV) was also to be mentioned in that context. Many of the issues were very complex and unresolved. Therefore, it was not appropriate, or even possible, to comment on specific items of the draft principles and guidelines relating to intellectual property, and it was recommended that the draft principles and guidelines not include statements on such items. Folklore was one of those items. It was announced that the UNESCO/WIPO World Forum on the Protection of Folklore would take place in Thailand on 8 to 10 April 1997. Several WIPO member States considered that there was a need to develop a means of protecting folklore internationally, and the World Forum could provide a forum for the discussion of proposals for such protection.

11. The UNDP representative provided some written information about her organization's activities relating to minorities and vulnerable groups.

12. The FAO representative stressed the importance of indigenous knowledge and practices in agriculture. Historically farmers and indigenous communities had developed and provided the bases of all the foods we enjoyed today. The basic genetic resources which we used for modern food production were domesticated thousands of years ago by indigenous communities; modern plant

varieties drew upon their work and the genetic material in their fields. The Special Rapporteur's draft principles and guidelines were very much in line with the activities being undertaken by the FAO's intergovernmental Commission on Plant Genetic Resources.

13. The FAO representative referred to the International Undertaking on Plant Genetic Resources which had been adopted by the Conference of FAO in 1983. The Undertaking was a non-binding instrument whose interpretation had only been agreed upon 10 years after its adoption. In particular, FAO Conference Resolution 5/89 of 29 November 1989 recognized Farmers' Rights as rights arising from the "past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity". The Conference of FAO had recognized that there was no mechanism for the implementation of Farmers' Rights, and in its Resolution 3/91 of 25 November 1991, decided to implement Farmers' Rights through an international fund on plant genetic resources. The FAO representative noted that the Special Rapporteur had also proposed in her draft principles and guidelines that a trust fund be established to act as a global agent for the recovery of compensation for indigenous heritage. With the entry into force of the Convention on Biological Diversity, the Conference of FAO, in Resolution 7/93 of 22 November 1993, had begun the process of the negotiated revision of the International Undertaking on Plant Genetic Resources, in harmony with the Convention, including the realization of Farmers' Rights. The most recent meeting of the Commission on Plant Genetic Resources, held in December 1996, was part of these intergovernmental negotiations, at which new proposals had been made to strengthen the implementation of Farmers' Rights. In particular, he drew attention to the proposal of the developing countries which could offer a range of protections for indigenous people and ensure full benefits to farmers and indigenous and other communities embodying traditional lifestyles.

14. The representative of FAO raised a number of other relevant points. He noted the need to harmonize the concept of "heritage of humankind" over generations with that of "national sovereignty". He spoke of individual and collective rights, and underlined that plant genetic resources had been developed over a long time by countless individuals and communities as a collective resource. He drew attention to the notions of tangible and intangible property, explaining that seeds were not in themselves of particular value: their value was in the genetic information which they contained. He also spoke about the negotiating process in meetings related to plant genetic resources and considered that indigenous and non-governmental organizations needed to participate in such gatherings.

15. Although not able to be present at the Technical Meeting, UNESCO had requested that an information note on its present activities in relation to indigenous peoples be circulated. In the note UNESCO drew attention to a number of practical projects for the protection of the cultural heritage of indigenous people which it was supporting, in particular for the preservation of indigenous languages.

Draft principles and guidelines

16. Mrs. Daes introduced her draft principles and guidelines and analysed some of them. She explained that the draft had been circulated to indigenous peoples, Governments, the United Nations system and NGOs for their comments. The observations and suggestions had been carefully considered and taken into account. The draft had then been submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities and subsequently adopted. She then invited participants to make comments on the draft.

17. The views of the participants were very positive. Speakers welcomed the initiative taken by the Special Rapporteur and considered the draft a good basis for further protection of indigenous rights. Some specific comments were made on the draft principles as well as on sections of the guidelines. Reference was made to articles 26, 35 and 41 and in particular to the notions of informed consent and the negotiating environment. It was suggested that two new elements might be considered. For example, efforts could also be made to increase indigenous peoples' awareness of the existing intellectual property regimes so that they were better able to give their informed consent. Furthermore, some form of fact-finding investigations could be initiated in order to ascertain the measures being taken currently and those being planned by Governments. Reference was made to a recent amendment to the patent law in Peru by which indigenous knowledge was given wider protection; initiatives which would lead to the protection of farmers' rights were being considered by the Government of India.

18. Several participants stressed the importance of recognizing the essential role of indigenous people as the founders of our present agriculture and food systems. Some form of recognition of that indebtedness could be included in the draft principles. It was also suggested that the words "and cultural practices or systems" could be added after the word "territories" in the second sentence of principle 6. It was also suggested that the words "or resources" be added after the word "people" in principle 8. In regard to principle 8, clarification of the word "control" might be needed.

19. Several of the concepts contained in the draft principles reflected existing international instruments, especially ILO Convention No. 169, and note was taken of the notions of "guardianship" in principle 3, "ownership" in principle 7, and "control" in principle 7. The Special Rapporteur stressed that concepts had been chosen after consultation with indigenous people and her own deliberations on how best to protect the heritage of indigenous people.

20. It was recommended that some reference be made in the draft principles to the idea that the heritage of indigenous cultures should not be destroyed. The Special Rapporteur agreed that this point was important and drew attention to the Draft United Nations declaration on the rights of indigenous peoples in which an entire article (art. 7) was devoted to the protection of indigenous peoples against ethnocide or cultural genocide.

21. In principle 6 reference was made to control by indigenous peoples over traditional territories and it was felt useful to ensure that the idea of sustainable development was also included. The Special Rapporteur considered that this important point was covered by the reference to transmission to future generations.

22. Some concern was expressed about the concept of "revocability" in principle 10. It was felt that this principle might need clarification as agreements generally should be of a binding nature. Under present intellectual property regimes authors protected their ideas for a certain period, such as 30 years. The Special Rapporteur considered that the purpose of principle 10 was to confer on indigenous people the primary ownership of their intellectual property; limitations could be worked out when developing mechanisms for implementation.

23. Several comments were made about the guidelines. In guideline 11, it was suggested that the words "practices and resources" be added after the words "sites and knowledge" and the words "and scientific" after the word "artistic". In guideline 17, the word "resources" could be added after the word "information"; in guideline 19, the words "tangible or intangible" were thought to be better than "movable".

24. Reference was also made to guideline 26 and in particular to the notions of ex situ and in situ collections of plant genetic material. It was pointed out that more than half of known plants were in botanical gardens and in such cases it would be impractical to try to exercise any rights over this material, since the knowledge was already currently in the public domain. In this regard, guideline 58, which proposes the establishment of a trust fund, might be considered a more appropriate response. The idea of the trust fund should be expanded to include the notion of "remuneration rights" similar to those existing in some countries through public lending libraries or the so-called blank tapes royalties. The royalties accrued from the loan of books or the unauthorized use of a blank tape to record an artistic work are available for compensation to the authors and artists according to specific criteria. A similar arrangement might be considered for compensation for the use of indigenous knowledge.

25. In connection with the section dealing with business and industry, it was important to publicly disclose the origin of indigenous knowledge. Furthermore, it was considered necessary that businesses demonstrate that they obtained that knowledge with the informed consent of the owners or that it was clearly in the public domain.

Conclusions and recommendations

26. The importance and the usefulness of the Technical Meeting on the Protection of the Heritage of Indigenous People was underlined by all participants.

27. It was important that the relevant agencies and bodies of the United Nations system coordinate and harmonize their efforts in relation to the protection of the heritage of the world's indigenous people.

28. The protection of indigenous peoples' control over their knowledge was essential for their survival as well as that of humankind as a whole.

29. The study and the draft principles and guidelines on the protection of the heritage of indigenous people elaborated by the Special Rapporteur constituted a valuable contribution to the protection of indigenous cultural and intellectual property.

30. It was important that the principles and guidelines prepared by the Special Rapporteur be referred to indigenous peoples and addressed not simply to indigenous peoples and Governments, specialized agencies and other intergovernmental organizations, but also to academics, business, the media and others. Full support was expressed for this idea.

31. The report of the Technical Meeting should be submitted to the Sub-Commission and to the Commission on Human Rights at their next sessions.

32. The Special Rapporteur, should continue her work collecting information and data relating to the indigenous heritage from national, regional and international organizations and submit them annually to the Sub-Commission and the Commission, with a view to suggesting the adoption of additional means and measures for more effective protection of indigenous heritage. It should be emphasized that the heritage of indigenous cultures should not be destroyed.

33. The relevant United Nations organs and bodies as well as those of the specialized agencies should cooperate and provide any relevant assistance to the Special Rapporteur.

34. The Commission on Human Rights should take action on the principles and guidelines submitted to it by the Sub-Commission.

35. The Special Rapporteur should be invited by the Commission to present and analyse before it the draft principles and guidelines.

36. The Special Rapporteur should be entrusted to elaborate the draft mandate and scope of a trust fund to be established by the General Assembly of the United Nations to act, inter alia, as a global agent for the recovery of compensation for indigenous heritage.

37. The study of a number of contemporary problems relating to indigenous heritage should continue. In this respect the concepts of "heritage of humankind" and "national sovereignty", which are not always compatible, should be analysed and duly considered.

## Annex I

LIST OF PARTICIPANTS

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| SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES | Mrs. Erica-Irene Daes |
| FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO) | Mr. José Esquinas-Alcázar |
| INTERNATIONAL LABOUR ORGANIZATION (ILO) | Mr. L. Swepston<br>Ms. Chandra Roy<br>Mr. C. Ramos Veloz<br>Ms. Manuela Tomei<br>Ms. H. Rasmussen |
| UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP) | Ms. Sari Miettinen |
| UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP) | Mr. Mark Berman |
| WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) | Mr. Kurt Kemper |
| WORLD TRADE ORGANIZATION (WTO) | Mr. Nuno Pires de Carvalho |

## Annex II

AGENDA

1. Introductory remarks by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mrs. Erica-Irene Daes.

2. General comments, information and data related to the protection of the heritage of indigenous people provided by the representatives of the participating organizations and specialized agencies of the United Nations system.

3. Consideration of the draft principles and guidelines for the protection of the heritage of indigenous people prepared by the Special Rapporteur.

4. Suggestions and recommendations related to the draft principles and guidelines for the protection of the heritage of indigenous people including recommendations for supplementary and new mechanisms for strengthening the protection of the heritage of indigenous people.

5. Proposals for specific measures to facilitate cooperation and coordination for an effective protection of the heritage of indigenous people among all interested parties, in particular the Special Rapporteur, the Working Group on Indigenous Populations, the High Commissioner for Human Rights, and organizations and specialized agencies of the United Nations system.

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